

An Emergency By Any Other Name? Measures Against the COVID-19 Pandemic in Poland

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The measures introduced to prevent the spread of COVID-19 in Poland are among some of the most extensive and far-reaching, affecting many spheres of civil, political, economic, social and cultural rights. Few of these measures amount to recommendations and suggestions of specific behaviour, most of them are hard, legally enforceable orders and prohibitions and flouting them incurs the risk of severe financial punishment. Yet the legal framework for these measures causes a significant degree of controversy. This report aims to present a birds eye's view on the measures in Poland and to highlight some issues legal scholars and experts have taken with both the substantive side of the measures and the means by which they were introduced.

The Constitutional Framework

The Polish Constitution has an entire chapter (XI) devoted to “extraordinary measures”, which covers no less than three kinds of states of emergency: martial law, the state of exception and the state of a natural disaster. These three modes of switching the country into a special legal regime meant to overcome exceptional dangers cover quite well all the possible dangers. Martial law is meant to be introduced during external threats of military nature. The state of exception is supposed to be used in cases of internal upheaval and unrest. Finally, the state of natural disaster is envisioned to be used in case of a “natural catastrophe”. This term is expanded upon in the Statute on the state of natural disaster, a *lex specialis* to the constitutional regulation, which lists “mass occurrence of infectious diseases among humans” as one of the conditions for introducing such a state.

States of emergency are not the only legal means of limiting human rights and freedoms under the Polish Constitution. Article 31 par. 3 of the constitution outlines rules for such “ordinary” limitations. They must be introduced in a statute, be proportional and relevant to the goal which the limitations are to achieve. The Polish Constitutional Tribunal, back when it was a respected constitutional court, has elaborated extensively on the Polish proportionality test and the standards legislation limiting rights and freedom must meet to satisfy constitutional requirements.

Instead of introducing the state of a natural disaster, the Polish legislative and executive have opted for an array of measures found both in existing statutes of the parliament and resolutions (decrees) of the executive and in ones introduced specifically to counter the COVID-19 threat. At the same time, the plans to hold the presidential elections on 10th May are still in place, as proclaiming the state of natural disaster would automatically postpone them. The electoral angle of the situation was covered extensively by [Sadurski](#), [Ziółkowski](#), [Nowicka](#) and [Kustra-Rogatka](#), who all highlight the core legal, political and health concerns regarding the idea of holding an election in the midst of a pandemic. Poland did not invoke Art. 15 ECHR or Art. 4 ICCPR and did not notify the Council of Europe and the United Nations, respectively, of a derogation from either instrument on grounds of a national emergency.

Measures Against the Spread of COVID-19

The existing Statute on the prevention and control of human infectious diseases and infections, dating from 2008 (“Infectious disease Statute”), has provisions for introducing a state of epidemic threat and a state of an epidemic outbreak, two “mini-states of emergency” of statutory rank which were envisioned to be introduced in case of respectively, the danger of infectious disease and in case of a full-blown outbreak. The infectious disease Statute allows the government acting under the aforementioned states, to issue resolutions (decrees) limiting specific areas of activity. On 2nd March, the Polish parliament introduced a Statute on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them (“COVID-19 Statute”). This statute also amended several existing statutes, including the abovementioned Infectious disease Statute. On these grounds, the government has introduced several resolutions effectively limiting human rights and freedoms, covering an extensive array of areas of everyday life. Some of the strongest limitations in place as of 20th April concern:

1. freedom of movement, including a blanket ban on any personal movement within Poland with exceptions to some essential movement, a requirement for persons under the age of 13 to move outside only with adult supervision and a prohibition from entering some public areas,
2. freedom of assembly, with an effective ban of any physical public gatherings;
3. freedom of religion, with limits on the number of participants in religious activities, carried out in churches;

4. right to a fair trial, with court proceedings suspended and access to justice reduced significantly;
5. economic freedoms, including partial or total limits on means of conducting some areas of economic activity (restaurants, hotels, barbers and beauty salons, sports and fitness facilities, brick and mortar stores);
6. cultural rights, including shutting down of libraries, cinemas, archives, museums and restricting cultural and sports events;
7. right to education, including closing schools, pre-school facilities and higher education institutions;
8. the situation of vulnerable groups, with people with disabilities, people in poverty and homelessness and women, to name a few, all facing unique challenges arising from emergency measures.

Select Issues Concerning the Polish Emergency Measures

Several issues persist with these limitations, as well as even broader limitations introduced prior but since relaxed. Three areas of these concerns which relate to the legality of their statutory grounds, the means of their enforcement and the legal remedies available.

1. Legality

As mentioned earlier, the Polish Constitution sets out the rules for limiting human rights and freedoms in Polish law. The aforementioned statute on the prevention and control of human infectious diseases and infection does not pass the requirements of the aforementioned Art. 31 par. 3 of the Polish Constitution. A statutory law limiting human rights and freedoms should, at very minimum, outline the scope of the limitations, indicating what exact elements of a right or freedom can be limited and leaving as little as possible, preferably just the technical details, to lower-level legislation – a resolution introduced by the executive. The statute in question delegates to the government limitations that are worded in highly general, vague terms. For example, Art. 46b pt. 4 of the Infectious disease Statute allows the government to establish an obligation for people suffering from a disease or “suspected of being ill” to submit themselves to a medical examination or use “other preventive measures and treatments”. It is an incredibly broad regulation, lacking a list of examples of “measures and treatments” it gives one no indication of what sort of obligations could be imposed. Furthermore, the term “suspected of being ill” could be understood very broadly, given the relatively mundane symptoms of COVID-19 and the asymptomatic nature of its course in majority of cases.

But these aren’t the only issues one ought to take with the measures introduced in Poland. As another example, the Infectious disease Statute empowers the government to limit the freedom of movement in Poland through “temporarily limiting a particular means of movement” (art. 46 par. 4 pt. 1) and “prescribing a particular mode of movement” (art. 46b pt. 12). Leaving aside the tangent of just how unclear

these provisions are, the subsequent resolution of the Council of Ministers from 31st March established a blanket prohibition of any personal movement within Poland with exceptions related to some essential movement. The government was simply not empowered to prohibit movement in general. Article 92 of the Polish Constitution states that resolutions may be introduced by the relevant bodies only based upon a clear authorisation in a statute. No such authorisation exists for the government to flat out prevent any form of movement in the country, even if exceptions to this ban are rather broad and allow exercising some of the most important daily activities, such as moving between one's residence and workplace.

2. Means of enforcement

As it is the case with many other countries with an extensive branch of administrative law distinct from criminal and civil branches, the Polish legal system generally relies on two ways of enforcing the observance of the law. One is the route of criminal law, the core of which is enshrined in the Criminal Code and the Criminal Procedure Code. The other is the administrative law route, where fines and punishments of financial nature are foreseen in various statutes and prescribed using procedures provided for in the Administrative Procedure Code. Naturally, the matter of delineating between the criminal and administrative spheres has been always a source of contention and controversy. Yet as far as the measures introduced the fight COVID-19 are concerned, the means of enforcing the observance of bans, prohibitions and limitations was relegated overwhelmingly to the administrative sphere. Violating these measures incurs hefty, frequently prohibitively high fines, in some cases ranging up to 30.000 PLN (roughly 6.600 EUR) in a country where average monthly gross salary is just below 5.500 PLN (roughly 1.200 EUR). Unlike fines imposed as punishments for crimes and misdemeanours under criminal law, these administrative measures are not handed out by a court following a hearing and an opportunity for an individual to defend themselves, as is the case with criminal procedure. Instead, they are issued by a state official and are enforceable immediately, leaving no opportunity to challenge them before a court of law before the money is potentially collected. [Ma#ecki points out that this framework for enforcing anti-COVID19 measures is unconstitutional](#) and there's little reason to disagree with his assessment, as the legal structure set up by the executive appears to be designed to dissuade behaviour not just through the threat of high fines, but also through their inevitability and insurmountable barriers to legally challenging them.

3. Legal remedies

As in [many countries in the world](#), the pandemic has thrown courts in Poland into turmoil. Legal remedies against fines and punishments handed out for violations of measures against the spread of COVID-19 have encountered significant challenges, adversely impacting the right to a fair trial as provided in the Polish Constitution and relevant international instruments. The COVID-19 Statute suspended court-imposed time limits and the time limits in criminal proceedings, yet kept the criminal

courts open for handling urgent cases, such as challenges to pre-trial detention or protective measures. Yet as mentioned above, the fines and violations lie in the sphere of administrative law. Challenging such measures involves first a direct appeal to the body that issued the fines, and in case of that being unsuccessful, a claim before an administrative court. But these courts have shut down and suspended virtually all their activity, meaning that any possible hearings before an independent court are delayed. Once this delay is over, these courts will have to deal with a massive backlog of cases of all sorts arising from the pandemic, such as matters related to economic activities, taxes and other areas of regulation. Compounding the situation are long-standing issues with the Polish judiciary which have not been addressed insofar by the government, including understaffing, overwhelming reliance on paperwork, lack of effective electronic communication and case overload.

At the same time, the prospects for a speedy examination of the legality and constitutionality of anti-COVID19 measures in Poland look grim. Legal acts of dubious constitutionality should be subject to a prompt review by the Polish Constitutional Tribunal. As elaborated before on [Verfassungsblog](#), the Polish Constitutional Tribunal is now a hollow shell of its former self, completely taken over by the ruling party and able to act with competence and independence only if the subject matter is of no interest for the government. Where such interest exists, the incumbent President of the Constitutional Tribunal ensures that the ruling party will have its way, thanks to the court being stuffed with a majority of judges entirely loyal to the ruling party. To make matters worse, issues with the legality of the appointment of several judges of the Tribunal cast doubt as to legality of the Tribunal's rulings issued by such judges. This doubt has led the stakeholders empowered to challenge legislation before the Tribunal, including opposition parliamentarians, the First President of the Supreme Court and the Commissioner for Civil Rights, to mostly abandon the idea of going through the Constitutional Tribunal. Essentially, the core mechanism of ensuring that the legislative and executive will not promulgate laws that violate domestic, regional and international standards was rendered nonfunctional.

Conclusion

None of these criticisms takes away from the fact that many measures introduced in Poland are likely conducive to the goal of limiting the spread of COVID-19. Arguments as to whether one should be more strict or relaxed while preventing the pandemic are best left to epidemiologists and experts on security and health. But the constitutionality of the measures, the possibility of challenging legally both the law in general and its enforcements in specific cases are a vital issue. The outlook on measures introduced in Poland appears to match the depressing pessimism of the pandemic itself. Lacking effective national remedies, challenges to measures related to civil and political rights before ECtHR appear a distant prospect, and in the case of economic, social and cultural rights, Geneva seems even more remote. A very touching article here on [Verfassungsblog](#) advocated optimism in the face of the apocalypse, unfortunately, for people in Poland, justice might not come even if we overcome the pathogen.

